SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-2641

PAUL BIK HOGERVORST, JR.,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Petitioner, Paul Bik Hogervorst, respectfully prays that a Writ of Certiorari issue to the judgment and opinion of the Court of Appeals of the State of New Mexico, as affirmed by the Supreme Court of the State of New Mexico by its denial of writ of certiorari.

OPINIONS BELOW

The Court of Appeals of the State of New Mexico, in Cause No. 1660, on March 12, 1975 entered its written opinion (attached hereto as Appendix A); both the State

of New Mexico and the Petitioner herein filed petition for writ of certiorari to the Supreme Court of the State of New Mexico; the petition of the State of New Mexico was granted on April 3, 1975 under Cause No. 10410 in the Supreme Court of the State of New Mexico (attached hereto as Appendix B); the petition of the Petitioner herein was denied on April 30, 1975 under Cause No. 10435 in the Supreme Court of the State of New Mexico (attached hereto as Appendix C); on May 21, 1975 the Supreme Court of the State of New Mexico in said Cause No. 10410 quashed the writ of certiorari as having been improvidently granted (order attached hereto as Appendix D).

JURISDICTION

The Supreme Court of the State of New Mexico rendered its order quashing the writ of certiorari theretofore granted by it on May 21, 1975. This Petition for Writ of Certiorari is filed within 90-days of that date.

Jurisdiction is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

(1) Should the government be allowed to retry a defendant when the conviction obtained upon the first trial is reversed because of willful misconduct of the prosecutor?

(2) Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit retrial of a defendant when the conviction in the first instance was obtained by prosecutorial misconduct?

(3) Does the double jeopardy clause of the Fifth Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment to the United States Constitution, bar retrial of a defendant in a criminal case where willful misconduct of the prosecutor occurred in the first trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the Unites States are:

> *AMENDMENT 5* — " . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."
>
> *AMENDMENT 14* — "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Paul Bik Hogervorst, Jr. was indicted on September 7, 1973, in Dona Ana County, New Mexico, for the offense of bribery of a public officer. Upon trial to a jury, in February, 1974, the Petitioner was found guilty and sentenced on March 25, 1974 to serve a term of not

less than two nor more than ten years in the New Mexico State Penitentiary.

During trial of the case false evidence was introduced by the prosecutor (see opinion of Court of Appeals of the State of New Mexico, Appendix A hereto). At a *pretrial* hearing, an investigator for the district attorney testified to conversations with defendant about payoffs to city officials by defendant and also testified:

> "Q. Did you later discover that the payments, the City of Las Cruces, were actually taxes being paid to the City of Las Cruces?
>
> "A. Yes, I did."

Yet, at *trial* the prosecutor brought out, from the same witness, and others, what the New Mexico Court of Appeals characterized as:

> "Yet, at trial, the reference to city officials in Las Cruces is in the context that they had been bribed. On this record this evidence was false." (Opinion, Appendix A hereto).

At the time of the introduction of the false testimony, defense counsel moved for a mistrial, which was denied by the trial judge. The Petitioner, in his Motion for New Trial, again raised the issue, but that Motion was denied. In the Brief of Petitioner in the Court of Appeals of the State of New Mexico, the federal question was again raised in Point III thereof entitled:

> "The Due Process Clause Of The 14th Amendment To The United States Constitution . . . (is) Violated When The Prosecution Fails To

> Correct The Testimony Of A Witness Which He Knew To Be False."

Petitioner, in his petition for writ of certiorari in the Supreme Court of the State of New Mexico, again raised the federal issue here presented in the following language:

> "2. The sole question presented for review by this Petition is whether it is proper to allow a retrial of the Defendant in light of the grounds for reversal."

Thus, the federal question was timely and properly raised at all stages of the proceedings in the state courts.

REASONS FOR GRANTING WRIT

The instant case squarely presents a constitutional question mentioned in, but not resolved by, *United States v. Tateo*, 377 U.S. 463, 12 L.Ed. 448, 84 S.Ct. 1587 (1964) and *United States v. Jorn*, 400 U.S. 470, 27 L.Ed 2d 543, 91 S.Ct. 547 (1971). In *Tateo* the Court stated, in note 3:

> "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain."

And in *Jorn*, at note 12:

> "Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. . ."

The Court of Appeals for the State of New Mexico (Appendix A hereto) held and found that the prosecutor used false evidence, knowing it was false.

We deal here not with an inadvertent error, or a non-responsive answer by a witness, but instead with the intentional use of false evidence, the only purpose of which could be to obtain a conviction. Surely, the conduct of the government in this case deserves a more severe sanction than that in *Downum v. United States,* 372 U.S. 734, 10 L.Ed 2d 100, 83 S.Ct. 1033 (1963), where the Court held that the double jeopardy clause prevented retrial where the prosecutor did not have a witness available.

To allow retrial in the instant case would violate the very purpose of the double jeopardy clause. As stated in *Green v. United States,* 355 U.S. 184, 2 L.Ed 199, 78 S.Ct. 221 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (355 U.S. at p. 187-188).

Where the fact-finding process is tainted by the unethical conduct and deliberate wrongdoing of the prosecutor, the interest of society in convicting the guilty is massively

outweighed by the harm done to the accused, for he has had to bear the expense, anxiety and pressure of one criminal trial and an appeal. Yet to allow retrial under these circumstances means that the accused must again bear that expense and anxiety of a second trial. The obvious and apparent societal balance is to draw a distinction based on the presence or absence of culpable wrongdoing by the prosecutor; where there is no such wrongdoing, the balance tips in favor of the societal interest in punishing the guilty; in the case, as here, where there is such wrongdoing, the balance tips in favor of the accused because no other result will discourage the prosecution from similar behavior in the future.

The ruling sought by Petitioner would effect only a limited, but important, class of cases: Those involving conduct during trial by a prosecutor when he knows, at the time, that such conduct is improper and prejudicial, such as the knowing use of false evidence.

CONCLUSION

Upon a record of undisputed use of false evidence by a prosecutor, who knew that evidence to be false, the Petitioner respectfully prays that this Honorable Court grant this Writ, and order that reprosecution of Petitioner is barred by the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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San Antonio, Texas 78205
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Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee

v. **No. 1660**

PAUL BIK HOGERVORST, JR.,
Defendant-Appellant

COURT OF APPEALS OF NEW MEXICO
FILED
MARCH 12, 1975

Hazel M. Davis
Clerk

**APPEAL FROM THE DISTRICT COURT OF
DONA ANA COUNTY
BURKS, Judge**

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OPINION

WOOD, Chief Judge

Convicted of bribery of a public official, defendant appeals. Section 40A-24-1, N.M.S.A. 1953 (2d Repl. Vol. 6). We reverse because of the failure to correct false evidence concerning the bribery of Las Cruces officials.

Two indictments charged defendant with a public nuisance in violating §40A-8-1, N.M.S.A. 1953 (2d Repl. Vol. 6). The first indictment charged defendant with the display and the showing of the movie "Deep Throat". The second indictment charged defendant with maintaining and operating the Galaxy Book Store, referred to in the record as an "adult" book store. An order was issued for defendant to show cause why he should not be held in contempt for alleged disobedience of a subpoena to appear before the Grand Jury with "the full and complete film 'Deep Throat' . . ." There is substantial evidence that defendant paid $2,000 to District Attorney in an effort to have the District Attorney drop the prosecution of these matters.

Autrey, an investigator for the District Attorney, was a witness at a pretrial hearing. At that hearing Autrey testified to conversations with defendant in which defendant referred to payoffs to the City Manager and Mayor of Las Cruces. The payoffs were for the purpose of allowing defendant to continue in his business, At trial this business was identified as a pornographic book store. Autrey testified that he suspected the payoff was a bribe. He also testified:

> "Q. Did you later discover that the payments, the City of Las Cruces, were actually

taxes being paid to the City of Las Cruces?

"A. Yes, I did."

At the trial, Autrey again testified to the conversation with defendant about payoffs in Las Cruces. The prosecutor then asked Autrey about details of the payoffs. An objection was sustained. Thereafter, both Autrey and the witness Moore testified that defendant indicated he could not secure help from city officials in connection with the indictments. District Attorney Williams testified to a conversation with defendant in which the District Attorney stated he did not know how to handle the city officials.

The only evidence in this record is that the payoffs in Las Cruces were in fact the payment of taxes, and this evidence came from the District Attorney's investigator. Yet, at trial, the reference to city officials in Las Cruces is in the context that they had been bribed. On this record this evidence was false.

State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961) holds that the deliberate use of false evidence knowingly by a prosecuting officer in a criminal case constitutes a denial of due process of law if such evidence is material to the guilt or innocence of the accused. Here the evidence of alleged bribes was false. The State acknowledged the evidence was material in contending the evidence went to the defense of entrapment. It may be questioned whether the prosecutor knowingly or deliberately solicited this evidence because some of the testimony may fairly be read as nonresponsive to the questions asked. This, however, does not benefit the State. "The same result obtains when the

State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napua v. Illinois, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959). See Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972).

Defendant raises other issues concerning the denial of a fair trial. These issues are:

1. Testimony concerning alleged payoffs of certain persons in El Paso. The record is not as clear concerning the falsity of this testimony as it is concerning Las Cruces payoffs. The trial court consistently sustained objections to this testimony. State witnesses interjected this testimony in apparent disregard of the trial court's ruling.

2. When asked why he continued to investigate defendant after the defendant had been indicted, Autrey replied:

> "The information that he had given me with regard to paying off other officials. The FBI was interested in the interstate transportation of pornographic material. They were interested in the possibilities, I believe, is called white slavery, which is bringing women across the state line for purposes of Prostitution."

3. The alleged repeated and unnecessary references to pornography throughout the trial.

To decide these issues, we would have to consider various procedural matters relied on by the State. We do not decide them because the State's failure to correct false evidence requires a new trial. These issues, severally and

cumulatively, raise serious questions which should be resolved at conference prior to trial. See State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966); State v. Vallejos, 86 N.M. 39, 519 P.2d 135 (Ct. App. 1974); State v. Garcia, 83 N.M. 51, 487 P.2d 1356 (Ct. App. 1971); State v. Alberts, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

The judgment and sentence are reversed. The cause is remanded with directions to grant defendant a new trial.

IT IS SO ORDERED.

/s/ JOE W. WOOD
Chief Judge

WE CONCUR:

/s/ B. C. HERNANDEZ J.

/s/ RAMON LOPEZ J.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Thursday, April 3, 1975

NO. 10410

STATE OF NEW MEXICO,
Petitioner,
v. Original Proceeding on Certiorari
PAUL BIK HOGERVOST, JR.,
Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari directed to the Court of Appeals, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the petition for writ of certiorari be and the same is hereby granted, and the writ of certiorari will issue from this Court as prayed for in the petition.

IT IS FURTHER ORDERED that Petitioner may file a brief within fifteen days from the date hereof; Respondent may file an answer brief within ten days from the filing of Petitioner's Brief.

ATTEST: A True Copy

/s/ Rose Marie Alderete

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Wednesday, April 30, 1975

NO. 10435

PAUL BIK HOGERVORST, JR.,
Petitioner,
v. Original Proceeding on Certiorari
STATE OF NEW MEXICO,
Respondent.

This matter coming on for consideration by the Court upon petition for Writ of Certiorari directed to the Court of Appeals, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 1660 be and the same is hereby retained by the Supreme Court for consideration in Cause No. 10410.

ATTEST: A True Copy

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Wednesday, May 21, 1975

NO. 10410

STATE OF NEW MEXICO,
Petitioner,
v. Original Proceeding on Certiorari
PAUL BIK HOGERVORST, JR.,
Respondent.

WHEREAS, it appearing to the Court that a Writ of Certiorari was issued by this Court on April 3, 1975; and

WHEREAS, it now appearing to the Court that said writ of certiorari should be quashed.

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court, on its own motion, that the writ of certiorari issued herein on April 3, 1975 be and the same is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 1660 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

SUPREME COURT

NO. 75-264

NOV 28 [illegible]

[illegible] CLERK

IN THE

Supreme Court of the United States

October Term, 1975

PAUL BIK HOGERVORST, JR.
Petitioner,

vs.

STATE OF NEW MEXICO,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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November, 1975

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IN THE

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October Term, 1975

NO. 75-264

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Petitioner,

vs.

STATE OF NEW MEXICO,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

ARGUMENT

The record in this case does not present the constitutional questions mentioned in the footnotes to the Court's opinions in *United States v. Tateo,* 377 U.S. 463, 12 L.Ed. 2d 448, 84 S.Ct., 1587 (1964) and *United States v. Jorn,* 400 U.S. 470, 27 L.Ed. 2d 543, 91 S.Ct. 547 (1971). Those footnotes suggest that reprosecution might be barred where the prosecutorial or judicial impropriety was motivated by a fear that the defendant might be acquitted. *Tateo,* note 3, U.S. at 468; *Jorn,* note 12,

U.S. at 485. The record here contains no intimation that the prosecutorial impropriety resulted from a fear of acquittal.

The Court of Appeals reversed petitioner's conviction because the prosecution failed to correct purportedly false testimony given by its witnesses. The Court did not conclude that the prosecution had intentionally solicited this testimony. It said,

> "It may be questioned whether the prosecutor knowingly or deliberately solicited the evidence because some of the testimony may fairly be read as non-responsive to the questions asked." (Petition, Appendix A, p. A.2.)

The record supports this characterization. The testimony which the Court of Appeals found false was given by the witnesses Autrey, Moore and Williams. The prosecution solicited testimony about bribery of Las Cruces city officials only once. It asked the witness Autrey why he continued to investigate the petitioner after indictments had been returned against him (R. 155). It asked the question in order to rebut the defense of entrapment, which had been raised at the beginning of the proceedings (R. 17, 29, 44, 128R, 128S). All other references to bribery of city officials were volunteered by the witnesses (R. 176, 181, 219-223, 225).

Petitioner was aware throughout the trial that the reputed bribery of Las Cruces city officials was actually a tax payment. He solicited this information from the witness Autrey at the pretrial hearing (R. 105U, 105V). He called it to the Court's attention again during the trial (R. 194). Yet he did not use this information to cross-examine any of the witnesses who gave the purportedly false testimony (R. 176-177, 195-200, 232-243).

The prosecution evidently felt it had no duty to correct the purportedly false testimony or to limit its potential for prejudice since the petitioner was in a position to do so. The prosecution's impropriety was the result of a good faith misunderstanding of its duty. The most extreme characterization that impropriety will bear is that it was the result of negligence

or slightly excessive zeal. Whatever its characterization, the prosecution's conduct is not comparable to the impropriety of the trial judge in the *Tateo* case where this Court held that reprosecution was not barred. *United States v. Tateo, supra.*

The record also shows that there was no possibility that the prosecution's impropriety could have been motivated by fear of acquittal. The prosecution's case was overwhelmingly strong. It had three eyewitnesses to testify that petitioner initiated, planned, and executed the bribery (R. 161-167, 181-189, 217-226). Its chief witness was the local district attorney (R. 217-226). To conclude that the prosecution, armed with such a case, feared acquittal, one must conclude it suffered a paranoia of near psychotic dimensions. There is nothing in the record to support that conclusion, either.

CONCLUSION

The record contains no evidence of prosecutorial impropriety designed to avert a jury verdict of acquittal. The petition for writ of certiorari should be denied.

Respectfully submitted,

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